Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 45135
Docket No. MW-42864
2343-NRAB-00003-220899

The Third Division consisted of the regular members and in addition Referee Sarah Miller Espinosa when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago and North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Snelton, Inc.) to perform Maintenance of Way and Structures Department work (remove track, make grade, install new switches, hauling and dumping ballast and associated duties) at the south end of Yard 9 in the Proviso yard facility beginning on September 9 through September 16, 2013 (System File B-1301C-171/1594531 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intent to contract out the above-referenced work and when it failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 1 and Appendix '15'.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. McCorkle, L. Jones, D. Johnson, T. Noakes and S. Duda shall each '... be compensated for and (sic) equal share of two hundred (200) straight time hours and seventy five overtime hours, that the employees of the contractor worked, at the applicable rates of pay. *' (Emphasis in original)."**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This claim was made on behalf of the named Claimants. At the time of the dispute, the Claimants established and held seniority within various classifications.

In this case, on December 28, 2012, the Carrier provided notice of its intent to contract work at "various locations on the Chicago Service Unit" The notice identified the specific work as "providing any and all fully operated, fueled and maintained front end loader(s), back hoe(s), track hoe(s) and bulldozer(s) to assist with installing turnouts and road crossing installation commencing January 01, 2013 thru December 31, 2013."

Rule 1B is central to the determination of this claim. Rule 1B states:

Rule 1 – SCOPE

Rule 1B is central to the determination of this claim. Rule 1B states in relevant part:

Rule 1 – SCOPE

> **B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the**

abandonment of lines authorized by the Interstate Commerce Commission.

By agreement between the Company and the General Chairman work as described in the preceding paragraph, which is customarily performed by employees described herein, may be let to contractors and be performed by contract's forces. However, work may only be contracted provided that special skills not possessed by the Company's Employees, special equipment now owned by the Company, or special material available only when applied or installed through supplier, are required, or unless work is such that the Company is not adequately equipped to handle the work, or, time requirements must be met which are beyond the capabilities of Company forces to meet.

In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in far advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in "emergency time requirements" cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith.

In addition to Rule 1B, the Berge-Hopkins letter, which is located at Appendix 15 in the Agreement, is also referenced by the Organization in support of its position.

The Organization established that the work at issue is within the scope of Rule 1. As stated in Third Division Award 43737 (Referee Jeanne M. Vonhof), this Board has consistently held that "if the work comes within the scope of Rule 1, the Organization need not establish that it has performed the work exclusively in the past. Exclusivity is not a necessary element to be demonstrated by the Organization in contracting cases."

In the instant matter, the Notice was timely in that it was provided more than 15 days in advance of the date of the intended contracting transaction. Specifically, notice was provided on December 28, 2012 and the work was performed on September 9 – September 16, 2013. The Organization asserts that the notice was deficient. However, the notice identifies that the Carrier may contract the work it specified performed by contractors utilizing front end loader(s), back hoe(s), track hoe(s), and bulldozers.

It is useful to consider a central purpose of the notice. Per Rule 1B notice is provided to allow the "General Chairman, or his representative" to request "a meeting to discuss matters relating to the said contracting transaction." Once such a meeting is requested, the Carrier is obligated to promptly meet and the parties "shall make a good faith attempt to reach an understanding concerning said contracting." Rule 1B also makes clear that if no understanding is reached, the Carrier may proceed with contracting if otherwise permitted to do so under the exceptions outlined in Rule 1B. Here, the notice provided to the Organization served this purpose.

The question is, therefore, whether the work met one of the exceptions to permit contracted work as delineated in Rule 1B. According to Rule 1 B:

> **work may only be contracted provided that special skills not possessed by the Company's Employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required, or unless is such that the Company is not adequately equipped to handle the work, or, time requirements must be met which are beyond the capabilities of Company forces to meet.**

The Carrier asserts in part that it had no front end loaders or dump trucks available to use on the property and did not have track skidsters, which were owned by the Signal Department and in use on its project, or crawler back hoes, which are specialized heavy operator equipment; all of which were need to complete the work in question. The Carrier further asserts it was prevented from using certain equipment (American crane) because of the overhead powerlines present where the switch was built. The record supports the contention that specialized equipment (crawler back hoe) was needed to perform the work. The work in question, therefore, falls within a negotiated exception that permits the Carrier to contract the work. That is, specialized equipment not owned by the Company was needed. In sum, the Carrier met its obligation under Rule 1B by providing the Organization with more than 15 days advance notice of the work to be contracted out and the Carrier was permitted to

contract out said work because the Carrier did not have the specialized equipment needed to perform the work.

Thus, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of November 2023.

LABOR MEMBER'S DISSENT
TO
AWARD 45125, DOCKET MW-42833
AWARD 45126, DOCKET MW-42835
AWARD 45128, DOCKET MW-42855
AWARD 45129, DOCKET MW-42856
AWARD 45130, DOCKET MW-42857
AWARD 45132, DOCKET MW-42860
AWARD 45135, DOCKET MW-42864
AWARD 45137, DOCKET MW-42893
AWARD 45139, DOCKET MW-42903
AWARD 45141, DOCKET MW-42925

(Referee S. Espinosa)

I must dissent to the Majority's findings in these cases. Specifically, the Majority improperly held that the Carrier's notification letters complied with the terms of Rule 1B and Appendix 15. Rule 1 requires the Carrier to notify the General Chairman not less than fifteen (15) days in advance of a contracting transaction. Moreover, the text of Rule 1 directs the parties to (See Appendix '15'), which clarifies what must be included within any notification pursuant to Rule 1. Appendix 15 clearly mandates that such "*** notices shall identify the work to be contracted and the reasons therefor." To state it more concisely, Rule 1 provides the general language that the Carrier shall notify the General Chairman. However, Appendix 15 specifically clarifies the requirements of such a notification. This same principle of contract interpretation was espoused by the Carrier to this Board and as stated above, it must be applied consistently. Accordingly, any notification that fails to identify the work to be contracted out and/or the reason therefor, is in direct violation of the Agreement. Awards 42419, 42423, 42435, 42438, 43577, 43578, 43580, 43592 already hold to this effect and should have been followed in these cases.

I must also note that this list was one (1) of three (3) virtually identical lists argued at the NRAB. Notably, the other two (2) deadlock lists fell directly inline with the precedent cited above. See Awards 44992, 44993, 44994, 44995, 44996, 44997, 44998, 44999, 45000, 45003, 45004, 45006, 45028, 45029, 45030, 45031, 45032, 45034, 45035, 45036, 45037, 45038, 45039, 45040, 45041, 45042, 42043 and 45044. I acknowledge that these awards were not provided to the Majority or the Deadlock Neutral in these cases at the hearing as they were not yet rendered. Nonetheless, they are indicative of the recent arbitral precedent on this property.

For these reasons, I must respectfully dissent.

Respectfully Submitted,

Zachary C. Voegel
Labor Member